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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

SUSAN REID WALSTAD, Plaintiff and Respondent, v. DAVID PAUL FRANKS, Defendant and Appellant.	C061310 (Super.Ct.No. SCV24031)

David Franks appeals from a judgment "restrain[ing] and enjoin[ing]" him from harassing and otherwise contacting his neighbor, Susan Walstad, her husband, Calvin, and their son, Christopher. For simplicity and to avoid confusion, we will hereafter refer to David Franks, Susan Walstad, Calvin Walstad, and Christopher Walstad by their first names when referring to them individually, and we will refer to the Franks family and the Walstad family respectively as the Franks and the Walstads.

David contends there is no substantial evidence that he harassed Susan within the meaning of section 527.6 of the

Code of Civil Procedure section (further section references are to the Code of Civil Procedure unless otherwise specified) and that there is "no evidence of a reasonable probability" he would harass Susan in the future such that a restraining order was required. It follows, he argues, the order requiring him to pay Susan's attorney fees and costs must be reversed. We shall affirm both the judgment and the order awarding attorney fees and costs.

FACTS

We summarize the facts in the light most favorable to the judgment (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787), and discuss conflicting evidence only as relevant to our analysis of David's contention that no substantial evidence supports the judgment.

When this action was commenced, the Franks and the Walstads had lived across the street from each other in Loomis for about 11 years. The relationship between these families was "strained" to say the least. For example, their disputes even involved holiday decorations. For a reason not explained in the record, David objected to an "inflatable holiday snowman" displayed on the Walstads' property. The Walstads objected when David put up "an FU finger made out of Christmas lights."

Most of the disputes between the families involved David and Calvin. They verbally confronted each other on multiple occasions, each believing the other to be engaged in a campaign of purposeful annoyance. At one point, David unsuccessfully sought a restraining order against Calvin because David's vehicle was damaged due to

"over-spraying during the course of auto repair work which [he] believe[d] was being illegally conducted on the Walstad property." David later acknowledged his request for a retraining order was "ill-advised" because his complaints "were not the sort which give rise to a restraining order." David also lodged several complaints with Calvin's employer, the Roseville Police Department, but was advised that the conduct complained about had nothing to do with Calvin's service as a law enforcement officer.

By November 2008, David had turned his attention towards Susan. At the hearing on the restraining order, Susan testified that David would wait until Calvin's patrol car was gone and then, as she put it, "he comes out and he watches me, he stares at me, he photographs me. He stares into our home when we are inside of our house, and now, he terrorizes me on the road."

On November 2, 2008, Susan was walking a yearling horse down the street. The Walstads did not own this yearling, but kept it on their property for approximately three weeks while their horse, JR, was in Auburn. When David observed this activity from his driveway, he went into his garage to retrieve a camera, came out to the street, and took Susan's picture from behind. Susan shook her head and told David that she could not believe he was taking her picture. Offering no explanation, David quietly turned around and returned to his house. Susan called the sheriff's department and reported the incident.

At the hearing on the restraining order, David admitted taking this photograph of Susan. According to David, he took it to document what he perceived to be a violation of the Placer County Code. He

explained that, when he saw the yearling on the Walstads' property, he believed they were attempting to bring a second horse onto the property. Thus, he went to the county recorder's office, where he discovered that the Walstads' parcel was .9814 of an acre. He thought that the Placer County Code did not allow a horse to be kept on less than a full acre of property.

On November 20, 2008, David again appeared to take Susan's picture. This time, Susan was walking with JR next to the fence of her property. When she saw David in his car at the end of his driveway, she stopped, hoping that David would simply drive away. Instead, he stopped at the bottom of Susan's driveway, pulled out a digital camera, and appeared to take her picture. As he did so, David displayed a "sleazy, creepy smile" that made Susan's "skin crawl," and then he drove away. Susan called the sheriff's department and reported the incident. When she was later contacted by a sheriff's deputy concerning the incident, she was "very unnerved and upset" and "at one point over the phone she started crying."

When David was contacted by a sheriff's deputy about this incident, he denied taking Susan's picture and explained that he "raised the camera to his face as if to take photographs, [but] did not take any, and then put the camera down." David also told the deputy that Calvin was "a dirty cop"; that there had been "damage to vehicles" and "break-ins" since the Walstads moved into the neighborhood; that "his son's life was threatened" by the spraying done on the Walstad property; and that he believed the Walstads were violating the Placer County Code by having a horse

on less than one acre of land. The deputy offered to make a report concerning the criminal allegations, but David declined. The deputy referred David to the Placer County animal control regarding his concern about the horse. Despite his "strong dislike for the Walstads," David never filed a complaint about their alleged illegal horse.

On December 4, 2008, Susan was driving home from work just before sunset. Nearly four miles from home, she suddenly noticed a Chevy Suburban was directly behind her car, tailgating at a distance of "five to six feet" at approximately 45 miles per hour with its high beam headlights on. Susan had trouble seeing due to the reflection of the high beams in her rear view mirror. When she made a right turn on her route home, Susan was able to see that David was the driver of the tailgating Suburban. Upon discovering the identity of the driver of the Suburban, Susan's emotions went from "[t]hreatened and worried" to "[t]errified." Based on David's admittedly "strong negative feelings" towards her family, Susan believed that David was following so closely with his high beams on in order to "terrorize" her and "run her off the road." Susan made it home, pulled into her garage, and then called the sheriff's department to report the incident.

Susan was "physically shaking and crying" when she was later contacted by sheriff's deputies about the incident.

When deputies spoke to them that evening, David said he and his son were driving home from his son's orthodontist appointment; his son claimed that David followed at a distance of one and a half car lengths. David was unsure whether his high beams were on during the

drive home. Later that night, David went out and unsuccessfully tried to take a picture of the Walstads' horse in its corral. About two weeks later, after a temporary restraining order was entered against David, he had his wife take a picture of the Walstads' horse in its corral.

Susan testified that the combined effect of these incidents had been severe anxiety, inability to sleep, weight loss, and "uncontrolled outbursts of crying." She was prescribed Xanax for the anxiety, but had been unable to take it because of her work as a school bus driver. As she explained: "I feel like I cannot go outside . . . unless I make sure that he's not out there. I cannot go out there. I don't have the freedom to walk out there and do what I need to do on my property without him harassing and trying to intimidate me."

The trial court did not believe David's explanation of the photo incidents or his version of the tailgating incident. We are bound by those credibility determinations. (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) The court found "by clear and convincing evidence that the photographing of [Susan] on the 2nd and 20th of November and the driving incident followed by later photographing on December 4th, all constitute a course of conduct engaged in by [David] directed at [Susan] that seriously alarmed, annoyed and harassed [Susan, and that] the conduct served no legitimate purpose. The conduct was such that would cause a reasonable person to suffer substantial emotional distress. As evidenced by [her] seeking medical and counseling treatment following the last incident, it is clear that [Susan] did suffer substantial emotional distress as

a result of [David's] conduct." Thus, the trial court granted Susan's request for an injunction and issued an order prohibiting David from contacting or harassing Susan, Calvin, or Christopher.[1]

David appeals from this judgment and from the subsequent order granting Susan's request for attorney fees and costs.

DISCUSSION

I

David contends his conduct did not amount to "harassment" within the meaning of section 527.6 -- that he did not engage in "a knowing and willful course of conduct" directed at Susan, and there was "no evidence of a reasonable probability that the conduct would be repeated in the future," such that a restraining order was required. The contentions fail.

Section 527.6 establishes a procedure for expedited injunctive relief to persons suffering harassment. A temporary restraining order may be obtained upon an affidavit showing reasonable proof of harassment (§ 527.6, subd. (c)), after which a hearing is held on the request for a longer injunction. (§ 527.6, subd. (d).)

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[1] The judgment stated in pertinent part: "[A]s to plaintiff [Susan Reid Walstad], Calvin James Walstad and Christopher William Walstad, defendant [David Paul Franks] is restrained and enjoined as follows: [¶] 1.) He shall not harass, attack, strike, threaten, assault, hit, follow, stalk, destroy personal property, keep under surveillance, block the movements of, contact (either directly or indirectly), or telephone or send messages or mail or e-mail. Defendant is further enjoined and restrained from coming within 25 yards of those named above. However, defendant shall be entitled to the full use of his real property and access to his home and mailbox. If [in] making full use of his real property and/or accessing his home and mailbox he comes within 25 yards of those described above[,] his conduct shall conform to the requirements of this order. . . ."

"At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry." (§ 527.6, subd. (d).) "If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment." (§ 527.6, subd. (d).) However, where the trial court "determine[s] that a party has met the 'clear and convincing' burden, that heavy evidentiary standard then disappears," and we review the evidence in accordance with customary rules of appellate review. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, p. 428.)

A trial court's decision to issue an injunction rests within its sound discretion and will not be disturbed without a showing of a clear abuse of discretion. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.) In determining whether the trial court abused its discretion, we review the court's findings under the substantial evidence standard, resolving all factual conflicts and questions of credibility in the respondent's favor and drawing all legitimate and reasonable inferences to uphold the judgment. (*Ibid.; Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) Even if the evidence at the hearing is subject to more than one reasonable interpretation, we may not reweigh the evidence or choose among alternative permissible inferences. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) Thus, we do not substitute our deductions for those of the trial court. (*Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912.)

For purposes of section 527.6, "harassment" is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6, subd. (b).)

A "course of conduct" is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" (§ 527.6, subd. (b)(3).)

In asserting that his "conduct did not amount to 'harassment' within the meaning of [section] 527.6," David distinguishes a number of cases involving "repeated and serious incidents of intentional harassment" as compared to the facts of this case, which David characterizes as merely "taking two snapshots of [Susan] with her horse in November 2008, and, on one occasion, following her vehicle too closely for 3.7 miles during a routine trip home at 4:30 on a weekday afternoon in December." In his view, these facts do "not support a finding that [Susan] has been stalked, threatened, or otherwise seriously harassed."

As we will explain, viewed in the light most favorable to the judgment, substantial evidence supports the trial court's conclusion that David's conduct amounted to harassment within the meaning of section 527.6.

The first time that David photographed Susan, he did so from behind her. The second time he appeared to take her picture, he did so with what Susan described as a "sleazy, creepy smile" that made her "skin crawl." When Susan reported these incidents to the sheriff's department, she was "very unnerved and upset" and "at one point over the phone she started crying." The trial court rejected David's claim that he was simply attempting to photograph her working with horses as evidence to support his claim that she was violating zoning ordinances by keeping a horse, or horses, on her property. The court found that David's explanation lacked credibility for two reasons: "first, as of the date of the hearing, no complaint had been lodged with the appropriate governmental agency; and second, [David's] conduct on December 4, 2008," i.e., the tailgating incident.

David claims the trial court's reasoning "does not withstand scrutiny." First, he asserts, he did not file a written complaint about the allegedly illegal horse because he was concerned only with the prospect of the Walstads owning two horses, and there was no evidence the yearling remained on the property after the time he attempted to take the second picture -- so there was no reason to file a written complaint. Second, he argues, it is "curious" for the trial court to have concluded from the subsequent tailgating incident that David's intent during the photograph incidents was to

harass Susan, rather than document a suspected violation of law. In this respect, David points out that he "did not attempt to pry into the [Walstads'] house with a long telephoto lens or photograph Susan while she was on her own property. The photo and attempted photo were taken while Susan was on public property, the street between the parties' houses, in full public view where anyone could see and photograph her (and the horse)."

David's contention fails because (1) it is based on viewing the evidence in the light most favorable to David, rather than applying the in-the-light-most-favorable-to-the-judgment standard of review, and (2) even if the evidence is subject to more than one reasonable interpretation, we may not choose among the alternative inferences; rather, we must resolve factual conflicts in favor of the judgment, drawing all reasonable inferences in its favor. (*Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912; *Howard v. Owens Corning, supra,* 72 Cal.App.4th at p. 631; *Schild v. Rubin, supra,* 232 Cal.App.3d at p. 762.)

Given the longstanding conflict between the families, the trial court reasonably could conclude that the fact David did not file the complaint for which he claimed to be collecting evidence showed he had an alternative motive for taking the photographs (to alarm and annoy Susan), and the fact the tailgating incident took place shortly after the photo incidents (and supports a finding that it was done to alarm and annoy Susan, see discussion *post*) showed the common purpose of all three of David's acts was to alarm and annoy Susan. Simply put, the trial court did not believe David's purported reason for photographing Susan, and we are bound by

that credibility determination. (*Estate of Young, supra,* 160 Cal.App.4th at p. 76.)

As we have noted, David claims that his "taking photographs of [Susan] with a horse cannot reasonably be characterized as invasive or intentional harassment" because he "did not attempt to pry into the house with a long telephoto lens or photograph Susan while she was on her own property;" rather, he photographed her while she "was on public property, the street between the parties' houses, in full public view where anyone could see and photograph her (and the horse)." We are not persuaded. As we have already explained, section 527.6 merely requires a knowing and willful course of conduct that is directed at a specific person, seriously alarms, annoys, or harasses the person, serves no legitimate purpose, causes the person substantial emotional distress, and would cause a reasonable person to suffer such emotional distress. (§ 527.6, subd. (b).) Nothing in this provision, or in the case law interpreting it, suggests that the harassment covered by this section must have taken place on the plaintiff's property. And the use of a camera to alarm, annoy, or harass a person can occur, as it did in this case, even without the use of high-powered camera equipment.

As to the tailgating, Susan testified that David followed her car in his Suburban for close to four miles at a distance of "five to six feet" at approximately 45 miles per hour with the high beam headlights on, causing her to feel "[t]errified." Susan immediately told sheriff's deputies that she believed he was trying to "run her off the road." She was "physically shaking and crying" when she told deputies about this incident. The trial court found this

incident "constituted a credible threat of violence" that was "committed knowingly and willfully and that [Susan] was reasonably placed in fear for her safety and that [David's] conduct served no legitimate purpose" and that was part of a course of conduct to alarm, annoy, or harass Susan.

We need not decide whether the tailgating incident constituted a credible threat of violence within the meaning of section 527.6, subdivision (b)(2).[2] Instead, we find the trial court reasonably could conclude the tailgating was part of "a knowing and willful course of conduct directed at [Susan] that seriously alarmed, annoyed, or harassed her, that served no legitimate purpose, and that would cause a reasonable person to suffer substantial emotional distress." (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1413, citing § 527.6, subd. (b)(3).)

David believes the tailgating incident did not amount to harassment because "[t]here is no evidence that he was speeding, making lewd or threatening gestures or remarks, weaving back and forth, honking, communicating, or attempting to contact [Susan] in any way." Nor did he "contact her car with his, [or] drive alongside her so close as to force her to take evasive action, [or] swerve around her and attempt to cut her off or force her off the road." And, he argues, there was no evidence that he "went out of

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[2] Section 527.6, subdivision (b)(2) defined "'Credible threat of violence'" as "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose."

his way to hunt down [Susan] and follow her." According to David, "[a]t most, the evidence is that he followed her too closely."

But the evidence does not simply reveal that David followed Susan too closely; it showed that he followed her at a distance of five to six feet for almost 4 miles at about 45 miles per hour, a rate of speed that made the tailgating distance very dangerous; and he did so with his high beam headlights shining into Susan's vehicle. The fact that his conduct was not worse does nothing to negate the trial court's conclusion that it, along with the acts of photographing Susan, constituted harassment.

Accordingly, we disagree with David's claim that his actions did not amount to "a knowing and willful course of conduct" within the meaning of section 527.6, subdivision (b)(3). We reiterate that a "course of conduct" is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. . . ." (§ 527.6, subd. (b)(3).) David correctly points out that, "[u]nder the plain meaning of the statute, [a single incident] cannot support issuance of the injunction." (*Leydon v. Alexander* (1989) 212 Cal.App.3d 1, 4.) Here, however, there was substantial evidence that David engaged in "a series of acts" (taking a photo of Susan from behind; appearing to take another photograph of her on another occasion; then following her car on a third occasion at a dangerously close distance for

nearly four miles with his high beams shining into her vehicle). The evidence supports the trial court's conclusion that these acts evidenced a continuity of purpose to seriously alarm, annoy, or harass Susan.

That there are cases in which persons have engaged in more egregious forms of harassment[3] does not change the facts that, as found by the trial court, David's conduct seriously alarmed, annoyed, or harassed Susan, served no legitimate purpose, and caused Susan substantial emotional distress. Susan testified the combined effect of the incidents resulted in her suffering anxiety, causing weight loss, loss of sleep, and uncontrollable crying--anxiety that was serious enough to warrant a prescription for Xanax.

We cannot say, as a matter of law, that David's conduct (taking photographs of Susan and tailgating her in the manner she described at the hearing) would not have caused a reasonable person to suffer such emotional distress. To the contrary, considered in light of David's long-standing animosity toward the Walstads, a reasonable person in Susan's place could have felt seriously alarmed, annoyed,

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[3] See, e.g., *Brekke v. Wills*, *supra*, 125 Cal.App.4th at p. 1403 [person wrote a series of "vile and vitriolic letters" to his girlfriend anticipating that her plaintiff mother would read them, one of which "contemplated killing plaintiff and her husband"]; *Ensworth v. Mullvain*, *supra*, 224 Cal.App.3d at p. 1108 [person "followed [a woman's] car, tried to stop her car in the middle of the street, circled around [her] office building, kept her house under surveillance, drove repeatedly around her house, made numerous phone calls, sent threatening letters to [her], and made phone calls to other professionals in the community in an effort to harm [her] reputation"].

harassed, and afraid after the tailgating incident, coupled with the two prior photographing incidents.

Lastly, we reject David's claim that "there was no evidence of a reasonable probability that the conduct would be repeated in the future."

An injunction "should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332.) However, given the nature of David's conduct towards Susan, the trial court reasonably concluded that, unless enjoined, David would continue to annoy and harass her whenever the opportunity presented itself.

II

David challenges the trial court's order directing him to pay for Susan's costs and attorney fees. He does not dispute that the trial court possessed the statutory authority to make such an order. (§ 527.6, subd. (i) ["prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any"].) He merely asserts that reversal of the judgment issuing the injunction "necessarily requir[es] reversal of the fee award."

As we have explained, David has not demonstrated that the injunction must be reversed. Because he does not provide any other basis for reversing the award of costs and attorney fees, the order must be affirmed.

It is firmly established that "[a]uthorization for the recovery of attorney fees includes authorization for recovery of

attorney fees incurred on appeal." (*Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 813, citing *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Therefore, Susan is entitled to costs and attorney fees on appeal in an amount to be determined in the trial court.

DISPOSITION

The judgment is affirmed. Susan is entitled to costs and attorney fees on appeal in an amount to be determined in the trial court. (See Cal. Rules of Court, rule 8.278(a)(1).)

SCOTLAND, P. J.

We concur:

SIMS, J.

ROBIE, J.